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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

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No. .....

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THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

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## STATEMENT AS TO JURISDICTION.

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### OPINION BELOW.

The opinion of the Supreme Court of Ohio from which this appeal is taken is officially reported in *163 Ohio State, 275.* It is also reported in *126 N. E. (2d), 321.* Copies of such opinion with the pertinent journal entry of the Board

of Tax Appeals of the state of Ohio are appended hereto as Appendix A. The journal entry of the Board of Tax Appeals of Ohio is unreported.

**GROUNDS ON WHICH JURISDICTION IS INVOKED.**

*(i)* This suit was brought under *Section 5717.04, Revised Code of Ohio (General Code Section 5611.2)* set forth in Appendix B, on direct appeal to the Supreme Court of Ohio from an order of the Board of Tax Appeals of the state of Ohio affirming the refusal of the appellee (Tax Commissioner) to issue certificates of abatement to appellant with respect to franchise taxes theretofore overpaid by it. Such certificates of abatement were sought by appellant from the Tax Commissioner pursuant to *Section 5703.05, Revised Code of Ohio (General Code Section 1464-3)*. See Appendix B.

*(ii)* The date of the judgment of the Supreme Court of Ohio sought to be reviewed and the time of its entry is April 27, 1955. Appellant filed its notice of appeal on July 15, 1955 in the Supreme Court of Ohio.

*(iii)* The jurisdiction of the Supreme Court of the United States to review the aforesaid decision by direct appeal is conferred by *Title 28 U. S. Code, Section 1257 (2)*.

*(iv)* The following cases are believed to sustain the jurisdiction of this court to review the aforesaid judgment:

*New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*. 338 U. S., 665;
*Missouri Insurance Company v. Gehner*, 281 U. S., 313;
*Macallen Company v. Massachusetts*, 279 U. S., 620;
*Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 U. S., 136;
*Miller v. Milwaukee*, 272 U. S., 713;
*Farmers Bank v. Minnesota*, 232 U. S., 516;

*Home Savings Bank v. Des Moines*, 205 U. S., 503;
*Bank of Commerce v. New York City*, 2 Black, 620;
*Weston v. City Council*, 2 Peters, 449.
*Bank Tax Case*, 2 Wallace, 200;

*(v)* This appeal involves the validity of the construction by the Supreme Court of Ohio of certain statutes of the state of Ohio, being Sections 5733.01; 5733.02; 5733.03; 5733.05; 5733.06; and 5733.12, *Revised Code of Ohio (General Code Sections* 5495; 5496; 5497; 5498; 5499; and 5491). The text of these statutes is set out verbatim in Appendix B, together with the volume and page where they may be found in the official edition.

## QUESTIONS PRESENTED.

This appeal involves the power of the state of Ohio under the *U. S. Constitution, Article I, Section 8*, and under *31 U. S. C. A., Section 742*, to impose an excise denominated a franchise tax against domestic corporations doing business in Ohio where the tax is measured by the value of the corporation's issued and outstanding shares of capital stock; and where this share value in turn is required to be determined by the corporate net worth as defined by statute, including in such net worth at a valuation securities issued by the U. S. Government and owned by the corporation paying the tax.

In practical operation and effect the tax is levied against corporate net worth, including therein the value of the corporation's federal securities. The tax has a direct impact upon the state-tax exempt federal securities (R., 23). Specifically the question presented is:

Do the Ohio Franchise Tax Statutes (Section 5733.01, R. C. of Ohio and following; G. C. 5495) as construed by the Supreme Court of the state of Ohio and applied by the

Tax Commissioner of said state impose a state tax on tax-exempt Treasury Notes or other obligations of the United States in violation of the *United States Constitution*, Article I, Section 8, or 31 *U. S. C. A.*, Section 742, by reason of the required inclusion of such obligations of the United States owned by appellant, an Ohio corporation, in its net worth tax base upon which the franchise tax is computed?

## STATEMENT OF THE CASE.

Appellant is a corporation organized and existing under the laws of the state of Ohio with its principal office in Middletown, in said state. It manufactures and sells multi-wall paper shipping sacks.

On June 2, 1952, and on October 2, 1952, appellant addressed to appellee (Tax Commissioner) two separate claims for certificates of abatement of franchise taxes for the years 1947 through 1951 (R., 1, 2).* These claims were made under authority of *Section 5703.05, Revised Code (G. C. 1464-3)*.

They set forth that appellant timely filed its annual reports required of domestic corporations for profit for each of the five years in question; and that appellant subsequently duly paid the franchise taxes for each of the five years on the basis of its annual reports. These claims for abatement called attention to an overpayment in franchise tax resulting from including in the computation of the fee charged against appellant under *Section 5733.06, R. C.*, bonds, notes or other obligations of the United States which should have been excluded on the doctrine of the *Wrenn* cases, 156 Ohio State, 583, and 158 Ohio State, 15. The claims set forth the federal securities owned

* All record references are to printed portions of the record.

by the appellant on the five annual report dates, which equaled the total sum of $1,092,000. Appellant claimed that it overpaid its franchise tax in the years in question in the amount of $1,092, being one-tenth of one percent of the total amount of federal securities owned by it during these years. It was this sum of $1,092 for which appellant sought certificates of abatement in franchise tax (R., 2, 3).

The report forms supplied by appellee (Tax Commissioner) (R., 33-47) require a statement of the total number of shares of the corporation issued and outstanding, together with the total amount of corporate surplus and reserves (R., 16, 21, 24, 27). These items are then required by appellee (Tax Commissioner) to be broken down to show the book value of all assets owned or used in Ohio and of all assets owned or used outside of Ohio, if any, together with total book value of all assets less total corporate liabilities. Such items were required to be detailed as to the kind and character of assets and the book value of each, as cash, accounts and notes receivable; prepaid and deferred items; trade marks; investments including miscellaneous stocks and bonds; United States tax notes; and physical property, both real and personal.

In requiring the listing at their value of the United States government securities owned by appellant, appellee did not permit the deduction of the federal securities from the corporate net worth tax base (R., 7, 8) but the full amount of the United States securities owned by appellant were required to be returned and were returned at their full value and bore their full burden of the state franchise tax at the rate of one-tenth of one percent of their value (R., 17).

Appellee (Tax Commissioner) on September 28, 1954 (R., 9-32) conducted a hearing of appellant's claims at

which time appellant pointed out the basis of its protest comprising the provisions of *Article I, Section 8, United States Constitution,* and *Section 742, Title 31, United States Code,* both in its preliminary statements made to the examiner (R., 11) and in the stipulation of facts forming a part of the record. In this stipulation both appellant and appellee agreed:

> "The only question presented arises from appellant's ownership of federal securities listed in each annual report under segregation of assets." (R., 16)

Testimony was adduced at this hearing by appellant's auditors that:

> "Q. * * * If you will strike out from page 3 of Exhibit A the item 'U. S. Bonds and Tax Notes $131,626' * * * if that is stricken out what effect does that have upon the amount of the tax which would be payable by the taxpayer to the state of Ohio.
>
> "A. If that is stricken out, the net worth would be reduced and the tax base would be reduced in an exactly equal amount, and the tax would be reduced by the sum of $1.00 per thousand times that amount." (R., 23)

Appellee refused to grant the certificate of abatement on April 12, 1954. In doing so, appellee wrote to appellant in material part:

> "* * * 3. The Tax Commissioner in determining the franchise tax of an Ohio domestic corporation for profit under the provisions of Section 5495 et seq. General Code (Section 5733.01 et seq. R. C.) shall use a tax base which is 'the value of the issued and outstanding shares of stock * * * shall be deemed to be the total * * * of its capital surplus, * * * undivided profits, and reserves * * *' without deduction therefrom of the value of any federal securities owned by such corporation (Wrenn Paper Co. v.

Glander, Tax Commissioner, 156 O. S. 583 overruled)." (R., 7)

Appellant filed notice of appeal to the Board of Tax Appeals on May 10, 1954 (R., 3) and in its assignment of eleven claimed errors appellant stated its appeal to be based on the erroneous and improper inclusion by the appellee (Tax Commissioner) in the corporation's net worth tax base of federal securities in violation of *Article I, Section 8, of the United States Constitution* and *31 U. S. C. A., Section 742* because the franchise tax was in practical operation and effect a tax upon United States Government bonds and interest thereon, having a direct impact upon such bonds.

The Ohio Board of Tax Appeals on November 8, 1954 (R., 50) affirmed appellee's ruling:

> "for two reasons. First: The judgment of the court in Fifth Third case completely answers and is dispositive of the issues now again presented. Second: The questions made present the constitutionality of the state's franchise tax law, as construed and now administered. This board is without jurisdiction in constitutional matters."

Appellant filed its notice of appeal in the Ohio Board of Tax Appeals and in the Supreme Court of Ohio on November 23, 1954 as of right, pursuant to *Section 5717.04 of the Revised Code of Ohio (General Code Section 5611-2)* stating the appeal involved "a question of interpretation and application of the *United States Constitution Article I, Section 8*, and the United States laws as more specifically hereinafter set forth in the assignments of errors." Then the notice of appeal set forth twelve assignments of error including references to *Section 742, Title 31 U. S. C. A.* The constitutional and other federal law questions were

argued in these proceedings before the Supreme Court of Ohio. In appellant's brief, at page 18, the argument read in material part as follows:

> "In cases in which the Supreme Court of the United States has upheld a state tax against the contention that it was one imposed on federal securities, the tax was measured either by amount of bank deposits (*Provident Institution v. Massachusetts,* 6 Wall., 611; *Society for Savings v. Coite,* 6 Wall., 594), by the amount of dividends paid (*Home Insurance Co. v. New York,* 134 U. S., 594), by the market value of the corporate shares (*Hamilton Co. v. Massachusetts,* 6 Wall., 632), or by net income (*Educational Films v. Ward,* 282 U. S. 379). All of these franchise cases imposed a tax having no direct relation to the *value* of federal securities. No attempt was made in any of these franchise cases to measure the tax by the *asset value* of the corporation such as was done by the state of New Jersey and is done by the state of Ohio. The distinction between those franchise taxing statutes held valid and those held invalid, is a clear one. If the franchise statute is measured on an asset or ad valorem basis and is increased or decreased directly proportionate to the value of federal securities, the tax is invalid. The rule is stated in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals,* supra, at 673, as follows:
>
> > 'Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax * * * is imposed on such securities regardless of the accounting label employed in describing it.'
>
> "This is particularly true where, as here, there is a clearly evinced intention to reach the value of the federal securities."

And again at pages 20 and 21, the argument read as follows:

> "The franchise tax statutes were construed by the Supreme Court in the *Wrenn* case, supra, syl. 3, to 'exclude federal securities from the determination of

the franchise tax.' The *Fifth Third Union* decision, supra, overruling the *Wrenn* case, supra, and thereby removing the protection afforded federal securities from a direct imposition of the tax, evinces a clear in tention when followed by the appellee, as in this case, to tax such federal securities. Especially is this true when the appellee, as here, prescribes franchise tax forms and specially requires a listing of the federal securities on the books of the corporation along with all other assets which are similarly valued ad valorem. A statute, once construed and applied to exclude federal securities, later amended or construed to include federal securities in order to increase the revenue for the state, is obviously aimed at the federal securities, and such action becomes within the purview of the prohibitions stated in *Macallen Company v. Massachusetts,* supra; *Miller v. Milwaukee,* supra; *Bank Tax Cases,* supra. As stated in the *Macallen* case, supra, at page 631:

> 'This was a distinct change of policy on the part of the Commonwealth, adopted, as though it had been so declared in precise words, for the very purpose of subjecting these securities pro tanto to the burden of the tax.' "

The Supreme Court of Ohio, in affirming the decision of the Ohio Board of Tax Appeals refusing the certificates of abatement, said in material part at *163 Ohio State, 275, 276:*

> "Appellant contends that the Ohio franchise tax statutes * * * as construed and applied herein by the commission impose a direct tax upon United States securities and interest thereon contrary to *Section 742, Title 31 U. S. C. A.* and *Section 8, Article I, United States Constitution.*
>
> "The judgment of this court in the case of *Fifth Third Union Trust Co. v. Peck,* 161 Ohio State 169, 118 N. E. (2d) 398 is dispositive of the issues here presented.
>
> The decision of the Board of Tax Appeals is affirmed on authority of that case."

## SUBSTANTIALITY OF QUESTIONS INVOLVED.

The Ohio franchise tax is measured by the domestic corporation's surplus, reserves and undivided profits, including the value of its federal bonds; for although the language of the statute imposing the tax (Revised Code Section 5733.05) levies it upon the "value of the issued and outstanding shares of stock of every corporation", this value is defined by the same section of the statute as being "the total value as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits and reserves, but exclusive of * * *" certain enumerated items of liability. Thus, the tax is in effect an ad valorem property tax for both the base of the tax and the tax itself is increased or diminished by the amount of the corporation's net worth.

The decision of the Ohio Supreme Court in *Fifth Third Union Trust Company* case, 161 Ohio State, 169, holding the tax constitutional conflicts directly not only with the long line of decisions of the United States Supreme Court but also with several earlier decisions of the Supreme Court of Ohio relating to the same franchise tax statute.

The federal cases have been referred to in this jurisdictional statement under the topic of Grounds on Which Jurisdiction is Invoked. The most outstanding of these federal decisions and the one most controlling here is that of *New Jersey Insurance Company v. Division of Tax Appeals,* 338 U. S., 665. For although there a franchise tax was not involved but a tax on net worth, the Supreme Court of the United States said at page 674:

> "While we are not limited by the State's characterization of its tax, cf. *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 443 (1940), we likewise do not think the assessment can be sustained as one levied on a corporate franchise."

At that page (674) and the preceding page, the United States Supreme Court completely distinguished cases relied upon by the New Jersey Division of Tax Appeals to sustain the tax as a franchise levy. The language used at the pages indicated, to distinguish franchise tax cases from the New Jersey ad valorem tax, is peculiarly pertinent here as showing the impropriety of the present tax as well as the substantiality of the federal questions its imposition creates.

The protection of the federal taxing power and its fiscal operations from state taxation has always been a function of which the federal judiciary is especially jealous no matter what form the state imposition takes or what label it bears.

And this is especially so where, as in the *Macallen* case, 279 U. S., 620 at 631, there was a distinct change of policy on the part of the taxing authorities "adopted, as though it had been so declared in precise words, for the very purpose of subjecting these securities pro tanto to the burden of the tax." Similarly, in *Miller v. Milwaukee,* 272 U. S., 713 at 715:

> "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim."

There is no room for doubt in this case that federal securities are the obvious aim of the Ohio franchise tax under the Ohio statutes as construed by the Ohio Supreme Court in the *Fifth Third Union Trust Company* case, 161 O. S., 169, for there the Ohio Supreme Court overruled the earlier decisions of *Wrenn Paper Company v. Glander* in

156 Ohio State, 583 and 158 Ohio State, 15. Employing in so doing significant language, the Ohio court observed at pages 174 and 175:

> "Section 5495, et seq. General Code, imposing a franchise tax on domestic corporations for profit, for the privilege of exercising their franchises in this state, were enacted primarily for the purpose of raising revenue.
>
> "The General Assembly may prescribe the rules for arriving at the value of the franchise for computing the tax to be assessed thereon, but such rules must be reasonably fair and just in their operation. An arbitrary rule or standard which has no relation to the true value is invalid. The exclusion of a major portion of the assets of one corporation, in determining the value of its franchise, because of the character of some of its investments, whereas all the assets of another corporation are included because it has no such investments, would not be fair or just * * *.
>
> "Application of the principle announced in the *Wrenn Paper Company* case will result in absurd situations. In the instant case such application would mean that the capital accounts of each bank would have no taxable value and each would be relieved from paying any franchise tax except the minimum fee of Twenty Five Dollars ($25.00). This was not the legislative intent * * *."

It must be observed in the *Wrenn* cases the Supreme Court of Ohio theretofore had construed state statutes respecting franchise tax in such a manner as to require the exclusion of federal securities from the tax base. The language of the Supreme Court of Ohio in the *Fifth Third Union Trust Company* case quoted above, can, therefore, mean only that in order to avoid discrimination in matters of franchise tax between corporations who own federal securities and those who did not own federal securities, the federal securities must be taxed. This is the ines-

capable result of the conflicting decisions of the Supreme Court of Ohio in the *Wrenn* cases and in the *Fifth Third Union Trust* case.

It necessarily follows, both from the long line of federal decisions and of the several conflicting decisions of the Supreme Court of Ohio, the federal question here presented is a substantial one. Otherwise appellee will continue to tax federal securities on an ad valorem basis under the guise of a franchise tax and justify his conduct on the basis that he is avoiding a discrimination in matters of state taxation between corporations who own federal securities and those who do not.

Appellant respectfully represents that the question presented here is substantial because a decision by the Supreme Court of the United States thereon will conform the thinking of the taxing officials and the judiciary of the state of Ohio with federal law.

## JUDGMENT APPEALED FROM.

A correct copy of the order and judgment here appealed from is set forth in Appendix C.

Wherefore, appellant, The Raymond Bag Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under *28 U. S. Code, Section 1257 (2).*

Respectfully submitted,

WELLMORE B. TURNER,
GUY H. WELLS,
1100 Hulman Bldg., Dayton 2, Ohio,
*Attorneys for The Raymond Bag Company, Appellant.*

## APPENDIX A.

### Opinion of the Supreme Court of Ohio Together With Concurring Opinion of Hart, J.

**Stewart, J., Dissents.**

Reported in 163 O. S., 275, 126 N. E. 2d, 321.

(Decided April 27, 1955.)

*Per Curiam.* Appellant contends that the Ohio franchise tax statutes, Section 5495 et seq., General Code (Section 5733.01 et seq., Revised Code), as construed and applied herein by the commissioner, impose a direct tax upon United States securities and interest thereon contrary to Section 742, Title 31, U. S. Code, and Section 8, Article I of the United States Constitution.

The judgment of this court in the case of Fifth Third Union Trust Co. v. Peck, Tax Commr., 161 Ohio St., 169, 118 N. E. (2d), 398, is dispositive of the issues here presented. The decision of the Board of Tax Appeals is affirmed on authority of that case.

Decision affirmed.

Weygandt, C. J., Matthias, Hart, Zimmerman, Bell and Taft, JJ., concur.

Hart, J., concurring. I am the writer of the opinion in the case of Wrenn Paper Co. v. Glander, Tax Commr., 156 Ohio St., 583, 103 N. E. (2d), 756, holding that, in determining the franchise tax on an Ohio corporation for profit, pursuant to the provisions of Section 5495 et seq., General Code, federal securities owned by such corporation could not be included in the tax base because in legal effect such inclusion resulted in an illegal tax on such securities. That case was overruled by this court in the case of Fifth Third Union Trust Co. v. Peck, Tax Commr., 161 Ohio St., 169, 118 N. E. (2d), 398. I dissented in the latter case,

basing my dissent on the interpretation of ambiguous provisions of Sections 5328-1 and 5328-2, General Code, directing the manner in which the Tax Commissioner shall determine the franchise tax base.

Having given this matter further thought and consideration, I have reached the conclusion that the Fifth Third Union Trust Co. case adopts the better rule which has received persuasive judicial sanction. In the first place, the rule adopted in that case avoids an unjust discrimination in the corporate franchise tax as between corporations, whose assets represented by its shares of stock are invested in federal securities, and those corporations, whose assets are not so invested. See Western Union Telegraph Co. v. City of Omaha, 73 Neb., 527, 103 N. W., 84.

Also persuasive to me is the position taken by the federal Supreme Court in the case of Schuylkill Trust Co. v. Pennsylvania, 296 U. S., 113, 80 L. Ed., 91, 56 S. Ct., 31, in which the court held, in effect, that a state tax upon corporate shares as such, as distinguished from a tax upon the assets constituting the value of the shares, is not objectionable as a tax upon securities of the United States or its instrumentalities owned by the corporation.

The tax involved in that case was one levied on the value of the shares of a corporation, which included tax exempt federal securities and was therefore held invalid; but the court at the same time distinguished such a tax from one on the shares as such. See Cleveland Trust Co. v. Lander, 184 U. S., 111, 46 L. Ed., 456, 22 S. Ct., 394; Des Moines National Bank v. Fairweather, Mayor, 263 U. S., 103, 68 L. Ed., 191, 44 S. Ct., 234. Here the tax is on the franchise and not on the property of the corporation, or even upon the value of the shares of the corporation.

**Journal Entry of the Board of Tax Appeals.**

(Dated November 8, 1954.)

This cause is an appeal from an order of the Tax Commissioner made on April 12, 1954, which denied an application for a franchise tax abatement for sums exacted and paid during tax years 1947 to 1951, inclusive. The sum sought to be recovered is $1,092.66, which is claimed to have been illegally assessed upon federal securities improperly required to be incorporated within its franchise tax base.

The matter now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, the record of a hearing had before this board on September 28, 1954, exhibits and briefs of counsel.

In its brief, appellant says that the issues made present "two primary and equally important questions under the federal constitution and statutes", (31 U. S. C. A., Section 742). It appears that such question or questions were before the court in The Wrenn Paper Company v. Tax Commissioner, 156 O. S., 583, and Fifth-Third Union Trust Co. v. Peck, 161 O. S., 169.

The Board of Tax Appeals is now asked to reverse our Superior on the last noted case. The Tax Commissioner's order now complained of must be affirmed for two reasons. First: The judgment of the court in Fifth-Third case completely answers and is dispositive of the issues now again presented. Second: The questions made present the constitutionality of the state's franchise tax law, as construed and now administered. This board is without jurisdiction in constitutional matters.

For the reasons assigned, the order complained of must be and is affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

Earl H. Maurer, Secretary.

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## APPENDIX B.

### Applicable Statutes.

**Section 5717.04 (5611-2)**

(6 Baldwin's Ohio Revised Code and Service, Page 88, Title 57)

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court. * * *

**Section 5703.05 (1464-3)**

(6 Baldwin's Ohio Revised Code and Service, Page 8, Title 57)

All other powers, duties, and functions of the department of taxation * * * are vested in and shall be performed by the tax commissioner, which powers, duties, and functions shall include, but shall not be limited to the following:

* * * * * * * * * * *

(B) * * * the commissioner has the authority on written application of any person, firm, or corporation claiming to have overpaid to the treasurer of state at any time within five years prior to the making of such application any tax payable under any law which the department of taxation is required to administer, or on his own motion investigate the facts and make in triplicate a written statement of his findings, and, if he shall find that there has been an overpayment, issue in triplicate a certificate of abate-

ment payable to the taxpayer, his assigns, or legal representative which shows the amount of the overpayment and the kind of tax overpaid * * *.

**Section 5733.01 (5495)**

(6 Baldwin's Ohio Revised Code and Service, Page 164, Title 57)

The tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state and each corporation not for profit organized pursuant to sections 1729.01 to 1729.28, inclusive, of the Revised Code, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of exercising its franchise during the calendar year in which such fee is payable, and the tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, under the laws of any state or country other than Ohio, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.

**Section 5733.02 (5495-2 (5496)**

(6 Baldwin's Ohio Revised Code and Service, Page 165, Title 57)

Annually, between the first day of January and the thirty-first day of March each corporation incorporated under the laws of this state for profit, each corporation not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, each foreign corporation for profit, and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, doing business in this state, owning or using a part or all of its capital or property in this state, or authorized by the secretary of state to transact business in this state shall make a report in writing to the tax commissioner, in such form as the commissioner prescribes. The commissioner shall furnish corporations, on request, copies of the forms prescribed by him for the purpose of making such report. A domestic corporation shall not dissolve, and a foreign corporation shall not withdraw or retire from business in Ohio, after the first day of January in any year without making a franchise tax report to the commissioner and paying or securing the tax for the year in which such dissolution or withdrawal occurs.

The annual corporation report shall be signed by the president, vice-president, secretary, treasurer, general manager, superintendent, or managing agent in this state of such corporation. If a domestic corporation has not completed its organization, its annual report shall be signed by one of its incorporators.

**Section 5733.03 (5497)**

(6 Baldwin's Ohio Revised Code and Service, Page 166, Title 57)

The annual corporation report shall include statements of the following facts as of the date of the beginning of the current annual accounting period of such corporation:

(A) The name of the corporation;

(B) The name of the state or country under the laws of which it is incorporated;

(C) The location of its principal office, and, in the case of a foreign corporation, the location of its principal place of business in this state and the name and address of the officer or agent of the corporation in charge of the business in this state;

(D) The names of its president, secretary, and treasurer, with the post-office address of each;

(E) The kind of business in which such corporation is engaged;

(F) The date of the beginning of the current annual accounting period of the corporation;

(G) The amount of its capital, surplus, whether earned or unearned, undivided profits, and reserves, as shown by the books of the corporation; a complete schedule shall be filed with the report showing the object and amount of each such reserve; there shall also be filed with said report a schedule of the annual rates of depreciation and depletion;

(H) The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately; business done within

this state by domestic corporations shall include all business except extra-state business;

(I) The value of the good will of the corporation, as shown on its books, if carried as an asset.

**Section 5733.05 (5498)**

(6 Baldwin's Ohio Revised Code and Service, Page 166, Title 57)

After the filing of the annual corporation report, the tax commissioner, if he finds such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this section, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of:

(A) Proper and reasonable reserves for depreciation and depletion, as determined by the commissioner;

(B) Taxes due and payable during the year for which such report was made;

(C) Good will as set up in the annual report of the corporation when said annual report is accompanied by a certified balance sheet showing good will carried as an asset on the books of the company; such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commissioner only;

(D) Such further amount as, upon satisfactory proof furnished by the corporation, the commissioner finds to represent the amount by which the value of the assets,

other than good will, of the corporation, as carried on its books, exceeds the fair value thereof; claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commissioner shall then determine the base upon which the fee provided for in section 5733.06 of the Revised Code shall be computed as follows: divide into two equal parts the value as determined in this section of the issued and outstanding shares of stock of each corporation filing such report; take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in this state, and whose denominator is the fair value of all its property wherever situated, in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period, and whose denominator is the total value of its business during said year wherever transacted.

In determining the value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, the commissioner shall be guided by sections 5709.02 and 5709.03 of the Revised Code, except that investments in the capital stock of subsidiary corporations at least fifty-one per cent of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June, annually, the commissioner shall certify to the auditor of state the amount determined by him by adding the two figures thus obtained for each corporation.

**Section 5733.06 (5499)**

(6 Baldwin's Ohio Revised Code and Service, Page 168, Title 57)

On or before the fifteenth day of June, annually, the auditor of state shall charge for collection from each corporation a fee of one tenth of one per cent upon the value certified and shall immediately certify the same to the treasurer of state, provided that no fee shall be charged from any corporation which has been adjudicated a bankrupt, or for which a receiver has been appointed, or which has made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commissioner finds such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. The minimum fee shall be twenty-five dollars.

Upon receipt of the certificate of the auditor of state, the treasurer of state shall mail to each corporation at its principal office in the state, or to such person in the state as the corporation designates in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged, and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as provided in section 5733.12 of the Revised Code. No penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state."

**Section 5733.12 (5491)**

(6 Baldwin's Revised Code and Service, Page 170, Title 57)

All franchise fees or taxes received by the treasurer of state under sections 5733.01 to 5733.27, inclusive, of the Revised Code, shall be credited to the general revenue fund.

If any corporation fails to pay on or before the dates, or within the time fixed by law, the fee charged against it, the treasurer of state shall certify the list of such delinquent corporations to the auditor of state, who shall add to the tax or fee due a penalty of fifteen per cent. The auditor of state shall forthwith prepare proper duplicates and reports of such taxes, fees, and penalties and certify them to the attorney general for collection.

Thirty days after he receives such duplicates of delinquent taxes, fees, and penalties from the auditor of state, the attorney general shall certify to the tax commissioner a list of the corporations that have failed to pay such taxes, fees and penalties.

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## APPENDIX C.

### Journal Entry of the Supreme Court of Ohio.

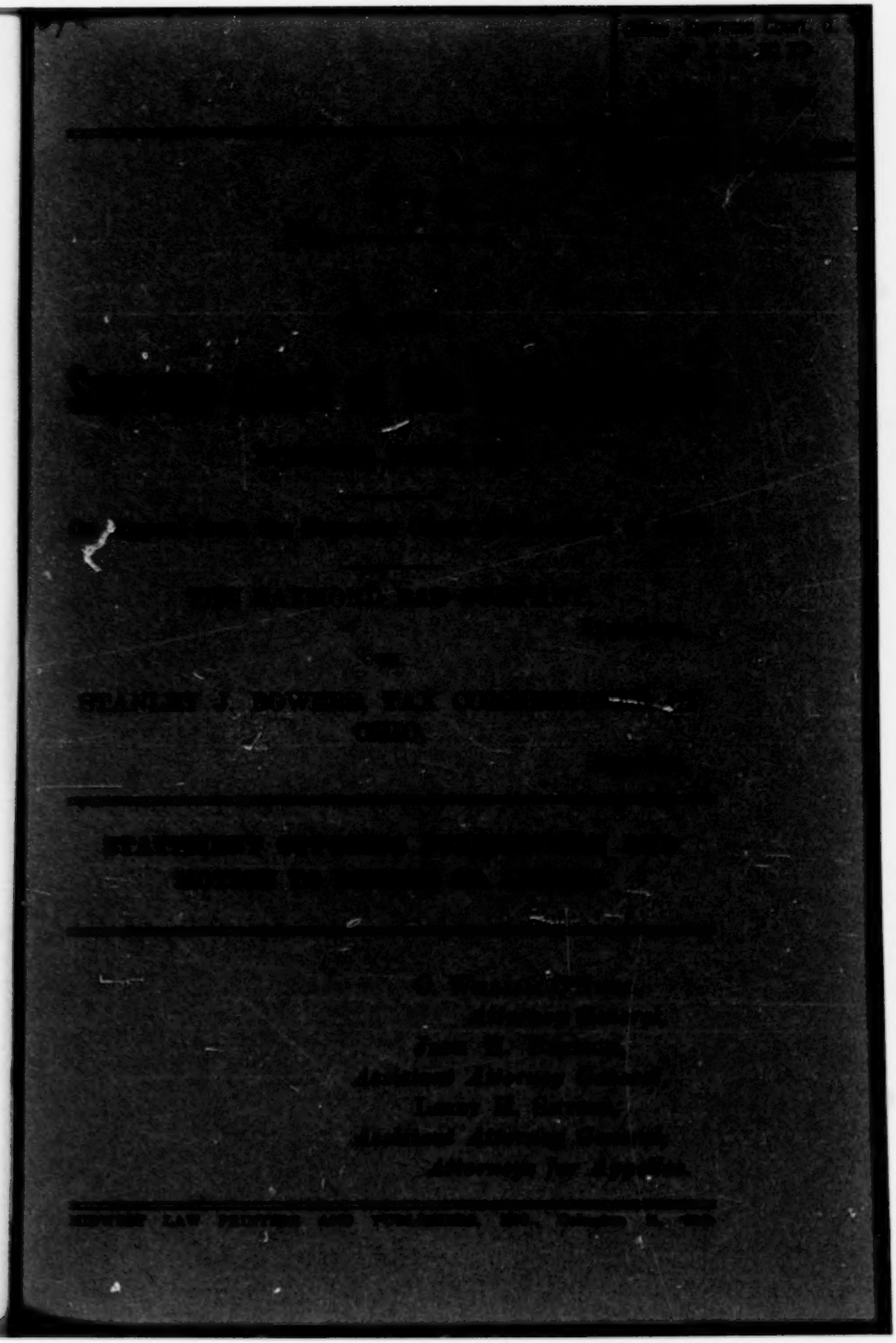
This cause came on to be heard upon the transcript of the record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed, for the reasons stated in the opinion rendered herein.

Ordered, that a special mandate be sent to the Board of Tax Appeals, to carry this judgment into execution.

I, Seba H. Miller, clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court this twenty-seventh day of April A. D. 1955.

/s/ Seba H. Miller, Clerk.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

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No. .....

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THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

## I.

### Statement of Issue on Appeal.

Appellant is a corporation for profit organized under the laws of Ohio. During the tax years in question it owned United States securities the value of which was returned in the annual report required of domestic corporations for profit. The value of these United States securities was included in the tax base, set up by Section 5733.05, Revised Code of Ohio, in arriving at the Ohio corporations tax due from appellant. The pertinent sections of the Ohio law are as follows:

Section 5733.01, Revised Code:

> "The tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state and each corporation not for profit organized pursuant to sections 1729.01 to 1729.28, inclusive, of the Revised Code, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of exercising its franchise during the calendar year in which such fee is payable, and the tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, under the laws of any state or country other than Ohio, except as provided in sections 5733.09 and 5733.10 of the Re-

vised Code, for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable."

Section 5733.05, Revised Code:

"After the filing of the annual corporation report, the tax commissioner, if he finds such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this section, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of:

"• • • • • • • • • •"

Section 5733.06, Revised Code:

"On or before the fifteenth day of June, annually, the auditor of state shall charge for collection from each corporation a fee of one tenth of one per cent upon the value certified and shall immediately certify the same to the treasurer of state, provided that no fee shall be charged from any corporation which has been adjudicated a bankrupt, or for which a receiver has been appointed, or which has made a general assignment for the benefit of creditors, except for the por-

tion of the then current year during which the tax commissioner finds such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. The minimum fee shall be twenty-five dollars.

"Upon receipt of the certificate of the auditor of state, the treasurer of state shall mail to each corporation at its principal office in the state, or to such person in the state as the corporation designates in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged, and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as provided in section 5733.12 of the Revised Code. No penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state."

The appellant initiated this action by filing with the Tax Commissioner of Ohio applications for certificates of abatement for alleged overpayments of franchise taxes for the years 1947 through 1951, claiming such overpayments resulted from an improper inclusion of federal securities in its franchise tax base. The applications were denied.

The Supreme Court of Ohio in its decision in the instant case affirmed the decision of the Ohio Board of Tax Appeals as follows, 163 Ohio St., 275, at page 276:

> *"Per Curiam.* Appellant contends that the Ohio franchise tax statutes, Section 5495 et seq., General Code (Section 5733.01 et seq., Revised Code), as construed and applied herein by the commissioner, impose a direct tax upon United States securities and interest thereon contrary to Section 742, Title 31, U. S. Code,

and Section 8, Article I of the United States Constitution.

"The judgment of this court in the case of *Fifth Third Union Trust Co. v. Peck, Tax Commr.*, 161 Ohio St., 169, 118 N. E. (2d), 398, is dispositive of the issues here presented. The decision of the Board of Tax Appeals is affirmed on authority of that case."

The appellant now seeks to invoke the jurisdiction of this court contending that the Ohio corporations tax as construed by the Supreme Court of Ohio is a levy upon government securities in contravention of Article I, Section 8, of the Constitution of the United States and Section 742, 31 United States Code Annotated.

## II.

## The Ohio Corporations Tax is a Franchise Tax Exacted for the Privilege Granted Corporations of Doing Business Within the State.

The tax challenged by the appellant herein is defined by the legislature of Ohio in Section 5733.01, Revised Code, as "the fee charged against each corporation organized for profit under the laws of this state * * * for the privilege of exercising its franchise during the calendar year in which such fee is payable * * *." The Supreme Court of Ohio in considering the nature of this same tax has likewise held that it is an excise tax not a property tax and is for the privilege of exercising a corporate franchise. *The Southern Gum Co., et al., v. Laylin*, 66 Ohio St., 578; *North High Realty Co. v. Evatt*, 143 Ohio St., 231; *The Fifth Third Union Trust Co., et al., v. Peck*, 161 Ohio St., 169.

Despite its characterization by both the legislature and the Supreme Court of Ohio as a franchise tax, appellant contends that it is in effect an ad valorem property tax. It

is reasoned that while the tax is measured by the value of the capital stock of a corporation this value is defined as the total value as shown by the books of the company of its capital, surplus, undivided profits and reserves and, therefore, the base of the tax and the tax itself are increased or diminished by the amount of the corporation's net worth. The conclusion reached by this argument is a complete non sequitur. The argument fails to recognize that the net worth of the company is used solely as a yardstick in determining the value of the corporate stock, the tax base, which in turn is the measure of the exercise of corporate privileges.

There can be no question but that the amount of a franchise tax upon a corporation may be graduated or measured by an appraisal of the whole, or any portion, of the corporate property without thereby making it a property tax. Most franchise taxes are so measured.

The cases of *Society for Savings v. Coite*, 73 U. S. (6 Wall.), 594, and *Provident Institution v. Massachusetts*, 73 U. S. (6 Wall.), 611, are a complete answer to appellant's contention. In each of those cases states had licensed so-called "banks of deposit" or savings banks which were authorized to accept deposits and to invest them, but which could transact no commercial banking business. In each case the state had levied a tax of three-fourths of one percent of the deposits of these savings banks, and each bank had invested sizable amounts of its deposits in government securities. It was held in each case that the tax was a lawful tax upon the corporate franchise and was not a forbidden tax upon the securities. It should be noted that in each case the simple act of removing government securities, or investments of whatever nature, from the tax base would have reduced the tax.

Significantly, in both the *Society for Savings* and *Provident Institution* cases the tax could not have been affected in any way by the character of the property in which the bank deposits were invested. Likewise, the Ohio corporations tax is unaffected by the character of the property in which the capital stock is invested.

Any doubt as to the nature of the tax in question is removed by that provision in Section 5733.06, Revised Code, set out heretofore, which reads:

> "* * * provided that no fee shall be charged from any corporation which has been adjudicated a bankrupt, or for which a receiver has been appointed, or which has made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commissioner finds such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. * * *"

It is clear from the above quoted language that the Ohio corporations tax can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise and, a fortiori, the privilege of exercising the corporate franchise is the legitimate object of the tax.

## III.

**The Tax Being One on the Corporate Franchise, the Value of Federal Securities Need Not Be Deducted Before Valuing the Tax Base.**

As has been shown, the Ohio tax on corporations is an excise as distinguished from a property tax. There is, therefore, no constitutional requirement that the value of federal securities be deducted before valuing the issued and outstanding shares of stock of a corporation, which are used to measure the franchise tax.

This court has repeatedly made the distinction between a tax invalid because laid directly on governmental instrumentalities or income derived therefrom and an excise which is valid because imposed on corporate franchises even though the corporate property or income which is the measure of the tax embraces tax-exempt securities or their income. *Educational Films Corporation of America v. Ward*, 282 U. S., 379, 75 L. Ed., 400. Also, *Home Insurance Co. v. New York*, 119 U. S., 129, 30 L. Ed., 350; *Pacific Company v. Johnson*, 285 U. S., 480, 76 L. Ed., 893; *Tradesmens National Bank v. Oklahoma Tax Commission*, 309 U. S., 560, 84 L. Ed., 947.

The case of *New Jersey Realty Title Insurance Company v. Division of Tax Appeals*, 338 U. S., 665, is in no way pertinent to the question appellant attempts to raise here, for, as pointed out in appellant's brief, that case did not involve a franchise tax or excise. Rather, the New Jersey tax there under consideration was a tax on the intangible personal property of stock insurance companies.

Nor is there in the case of *The Fifth Third Union Trust Co., et al., v. Peck*, 161 Ohio St., 169, and its overruling of

*Wrenn Paper Co. v. Glander,* 156 Ohio St., 583, a declaration of legislative intention to tax federal securities comparable to that in *Macallen Company v. Massachusetts,* 279 U. S., 620, 73 L. Ed., 874. In the case of the Massachusetts tax the legislature removed an express exemption granted such securities from which this court reasoned that the legislature intended to reach the securities qua such. *The Fifth Third Union Trust Company* decision, however, was merely to the effect that Sections 5709.02, 5709.03 and 5701.06, Revised Code of Ohio, which in defining investments excluded those issued by the United States or any of its instrumentalities, applied only to the Ohio tax on intangible personal property and that the rule of in pari materia was misapplied to the Ohio corporations tax in the *Wrenn* case. The sole import of this decision is that the legislature of Ohio, in the enactment of the Ohio corporations tax, did not intend to specifically exclude federal securities in valuing the tax base by which the franchise tax is measured.

IV.

**No Substantial Federal Question Presented by the Appeal.**

Clearly the Ohio corporations tax is an excise on the privilege of exercising a corporate franchise. It is equally apparent that the inclusion of the value of federal securities in arriving at the book value of the issued and outstanding stock of a corporation, the measure used to compute the franchise tax, is violative of neither Article I, Section 8, of the Constitution of the United States nor 31 U. S. C. A., Section 742.

It is submitted, therefore, that appellant has failed to raise a debatable constitutional question by this appeal.

**MOTION TO DISMISS OR AFFIRM.**

For the foregoing reasons and based upon the foregoing authorities, this appellee moves that the court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

C. WILLIAM O'NEILL,
*Attorney General,*
JACK H. BERTSCH,
*Assistant Attorney General,*
LARRY H. SNYDER,
*Assistant Attorney General,*
*Attorneys for Appellee.*

Office - Supreme Court, U. S.
FILED
SEP 20 1955
HAROLD B. WILLEY, Clerk

No. 316.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955.

On Appeal from the Supreme Court of the State of Ohio.

THE RAYMOND BAG COMPANY,
Appellant,

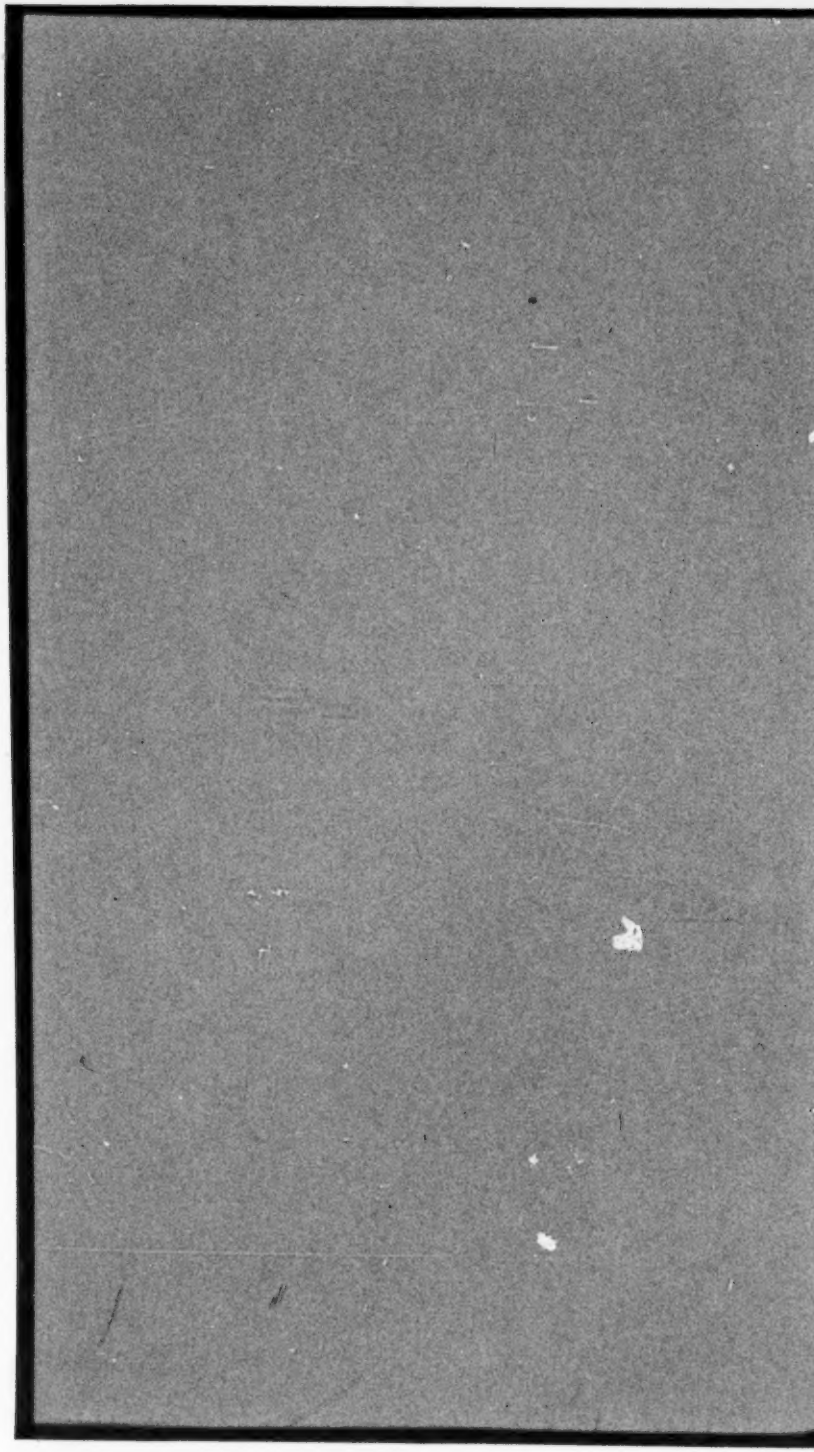
vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

WELLMORE B. TURNER,
GUY H. WELLS,
1100 Hulman Bldg., Dayton 2, Ohio,
*Attorneys for The Raymond Bag Company, Appellant.*

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio



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